No. 2646

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AETNA LIFE INSURANCE COMPANY
a Corporation
PLAINTIFF IN ERROR

VS.

PORTLAND GAS & COKE COMPANY
a Corporation
DEFENDANT IN ERROR

Defendant in Error's Brief

In Error to the District Court of the United States
For the District of Oregon

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STATEMENT OF FACTS

This action was brought by Defendant in Error, to whom we shall hereafter refer as the Gas Company, to obtain indemnity under a policy of indemnity insurance from Plaintiff in Error, hereafter referred to as the Insurance Company, on account of certain expenses the Gas Company had been forced to incur in defending the claims against it of a number of its employees who had been engaged in the construction of the Gas Company's new plant adjoining Government Moorings near the City of Portland, Oregon. The complaint contains seven causes of action dealing respectively with the claims of seven of such employees. The statements of the

expenses incurred by the Gas Company in defending these claims as set forth in the original complaint are not questioned or disputed by the Insurance Company, nor is any question raised as to the right of the Gas Company to effect the settlements that were made. The contention of the Insurance Company is that the expenses of these claims are not such as the Insurance Company agreed to indemnify the Gas Company against under the "CONTRACTORS EMPLOYERS LIABILITY POLICY" upon which the action is based.

A copy of this policy is set forth in the Transcript of Record herein, pages 163 to 179 inclusive. For convenience of reference we set forth below a verbatim copy of the insuring clause of the policy with its title, viz.:

"Policy No. E-91221.

AETNA LIFE INSURANCE COMPANY,

Accident and Liability Department.

CONTRACTORS EMPLOYERS LIABILITY POLICY.

In consideration of the premium herein provided, the Aetna Life Insurance Company of Hartford, Connecticut (called the Company),

Does Hereby Agree to Indemnify

INSURING CLAUSE.

the Assured described in the Warranties hereof, within the amounts as expressed herein, Against Loss and/or Expense Arising or Resulting from Claims Upon the Assured for Damages on account of bodily injuries and/or death accidentally suf-

fered, or alleged to have been suffered, by an employee or employees of the Assured as provided in said Warranties, by reason of the business as described and conducted at the locations named therein, whether said injuries and/or death are accidentally suffered, or alleged to have been suffered, at the locations named or elsewhere, save and except claims arising by reason of:" (Exceptions not material herein.)

The policy contains no conditions, stipulations or exceptions, material herein, limiting the scope of the indemnifying covenant.

The nature of the injuries alleged to have been sustained by the employees who presented claims against the Gas Company is set forth in the various causes of action in the original complaint. In the case of Louis Weich the claim was that "he endured great pain, suffering and mental anguish and his mental system was permanently shattered and he was seriously and permanently injured in that his heart was inflamed and the valves and muscles thereof were wholly and permanently incapacitated from performing their normal functions and the lower limbs of Weich were benumbed and paralyzed." (Transcript of Record, page 8.)

In the case of I. M. Andrus, set forth in the seventh cause of action, the claim was that "he suffered paralysis of certain muscles of his arms and legs and that he had toe drop in his left foot and an incomplete wrist drop in his right hand and was numb to pin prick over part of the back of his right

hand and forearm and over the front of his left leg and ankle and that he was permanently injured and incapacitated from performing any work whatsoever." (Transcript of Record, page 27.)

The claims of the other employees were all for substantial and permanent impairment of their physical health and strength and bodily functions, as will appear from an examination of the various causes of action in the complaint. (Transcript of Record, pages 4-31.)

All of these injuries were alleged to have been incurred by reason of contracting typhoid fever while engaged in the business conducted by the Gas Company at Government Moorings and to have been due to the negligence of the Gas Company in furnishing these men with impure water in connection with that business. The Insurance Company does not claim that the Gas Company knew that the water contained typhoid germs or was likely to produce injuries or that the employees who claim to have been injured as a result of drinking this water knew that the water was liable to produce injurious results.

The question for this Court to decide, therefore, is whether or not the District Court erred in holding that the loss and expense incurred by the Gas Company arose and resulted from "Claims upon the Assured for Damages on account of bodily injuries * * * accidentally suffered, or alleged to have been suffered, by * * * employees of the Assured

* * * by reason of the business as described and conducted" * * * by the Gas Company, the Defendant in Error.

POINTS

The Expenses Incurred by Defendant in Error Were Within the Scope of Its Indemnity Policy With Plaintiff in Error and the Judgment of the District Court Should Be Affirmed.

AUTHORITIES

New Standard Dictionary (1913), definitions.

Webster's New International Dictionary (1911), definitions.

Fuller's Accident and Employers' Liability Insurance, (1913) 445.

Brintons, Limited v. Turvey, 1905 Appeal Cases 230, (House of Lords and Privy Council).

Western Commercial Travelers Ass'n v. Smith, 85 Fed. 401 (C. C. A., 8th Circuit).

United States Mutual Accident Ass'n v. Barry, 131 U. S. 100.

Columbia Paper Stock Co. v. Fidelity & Casualty Co., 78 S. W. 320; 104 Mo. App. 157.

H. B. Hood & Sons (Inc.) v. Maryland Casualty Co., 206 Mass. 223; 92 N. E. 329.

Fenton v. Fidelity & Casualty Co., 36 Ore. 283; 48 L. R. A. 770.

Tillamook Lumbering Co. et al., v. Liverpool & London & Globe Ins. Co., 175 Fed. 508 (Dist. Ct. Dist. of Oregon) affirmed 178 Fed. 161 (C. C. A. 9th Circuit).

Railway Mail Ass'n v. Dent, 213 U. S. 981 (C. C. A. 8th Circuit).

ARGUMENT

The policy sued upon is entitled "CONTRACTORS EMPLOYERS LIABILITY POLICY." It is a contract made between the Insurance Company and the Gas Company for the purpose of protecting the Gas Company in consideration of the payment of certain percentages of its payrolls against the expense of defending claims of its employes growing out of the work which they were employed to do. It is not a policy of "accident insurance." It is even more than insurance against liability. It is a broad, comprehensive contract to protect and indemnify the Gas Company against all loss or expense arising from claims upon the Gas Company for damages by its employes on account of bodily injuries accidentally suffered by reason of the business carried on by the Gas Company. It contains no limitations or exceptions in regard to the kind, nature or cause of the bodily injuries suffered or alleged to have been suffered out of which such claims against the Gas Company might arise, other than such limitation as may be signified by the use of the term "accidentally suffered."

It is stated in Plaintiff in Error's brief (page 9):

> "It was never intended that a policy of this nature should include a disease. It would place upon the Insurance Company a liability and a loss never contemplated. An insurance policy being a contract, the intention of the parties should receive consideration."

The first sentence above quoted is a mere arbitrary statement unsupported by evidence or authority. The authorities herein cited and hereinafter referred to definitely negative this fundamental assumption of Plaintiff in Error's argument. If the statement is made on the basis of supposed everyday practical experience a mere consideration of the question from this standpoint reveals the error of the statement. Blood poisoning is a disease, yet we presume it would not be disputed by the Insurance Company, in the absence of any stipulation in its policy to the contrary, that its policy covered the claim of an employe who suffered from blood poisoning as the result of some alleged negligent act of his employer. Pneumonia is a disease, yet we do not believe that it would be argued seriously that the claim of an employe who had suffered from pneumonia as the result of inhaling poisonous fumes, alleged to have been negligently introduced into the air breathed by the employe, was not covered by such a policy. The injurious effects upon the system of poison ivy are unquestionably the results of a disease, yet it has been held by the courts that

such injurious effects, as well as those of other recognized diseases, are within the scope of accident insurance policies where not clearly stipulated against by the terms of the policy. (See Columbia Paper S. Co. v. Fid. & Cas. Co., 78 S. W. 320, Railway Mail Ass'n v. Dent, 213 Fed. 981, and cases therein cited.)

The "intention of the parties" to this contract, as this appears from the title and insuring clause of the policy, was, on the part of the Insurance Company to indemnify, and on the part of the Gas Company to be indemnified against, the expense of claims of the Gas Company's employes for bodily injuries accidentally suffered in the course of their employment. It was the intention of both parties to make a broad indemnity contract, embracing all claims of the character mentioned that might be made against the Gas Company by its employes; not a contract emasculated into empty phrases by provisos, conditions and exceptions. Nor is it the function of the court to engraft such exceptions upon the policy upon the supposition that the Insurance Company would have made the exception in the policy if the occurrence of the particular bodily injuries had been foreseen. The intention of the contract received consideration and was made effective by the judgment of the District Court. No other result is possible under a common-sense construction of the contract.

In interpreting the expression "bodily injuries accidentally suffered" as used in this policy it is proper at the outset to consult the definitions of the component words as they appear in lexicons or dictionaries of recognized authority. A critical examination of these terms as defined by such authorities discloses the error in the premise assumed by Plaintiff in Error in the opening paragraph of its brief.

Webster's New International Dictionary (1911) defines "bodily" as "of or pertaining to the body, in distinction from the mind." The New Standard Dictionary (1913) defines "bodily" as "of or pertaining to the body; corporeal." Webster defines "injury" as "a damage or hurt done to or suffered by a person or thing; detriment to or violation of, person, character, feelings, rights" etc. The Standard defines "injury" as "any wrong, damage or mischief done or suffered." No authority has been cited or can be found for the statement in Plaintiff in Error's brief that " 'bodily injury' is used in contradistinction to 'bodily disease.' "

"Accidentally" is defined by Webster as "in an accidental manner; unexpectedly; by chance; unintentionally." An "accident" is defined as "an event that takes place without one's foresight or expectation." The Standard defines "accidentally" as "in an accidental manner, as by accident or chance; unintentionally; casually"; an "accident," as "anything that happens; especially anything occurring unexpectedly; any unpleasant or unfortunate occurrence that causes injury, loss, suffering or

death." Plaintiff in Error's brief, page 5, cites Bouvier as defining an "accident" as an event "which under the circumstances is unusual and unexpected by the person to whom it happens."

There can be no serious contention in this case but that the claims of injuries made against the Gas Company were claims of bodily injuries. Nor can it be contended, following the definition of Bouvier approved by Plaintiff in Error, that these injuries did not constitute an event which under the circumstances was unusual and was unexpected by the person to whom it happened. No employe expected to suffer typhoid fever and its resulting injuries from drinking water furnished him by the Gas Company. The event or injury was to each employe so afflicted entirely unintentional, unexpected and unusual, and was not such as could reasonably have been contemplated by him when he drank the water. Nor was the event the natural and probable consequence of the act of drinking the water, the consequence which ordinarily follows, or which could reasonably be anticipated. The facts as admitted on this appeal demonstrate, on the very authority relied upon by Plaintiff in Error in its brief, that the injuries and damages sustained were accidentally suffered within the meaning of the policy. An examination of the cases relied upon by Plaintiff in Error and of the authorities cited herein confirms this conclusion.

Plaintiff in Error at page 4 of its brief has cited a number of authorities in supposed support of its

position before this Court. With the exception of the two Michigan cases which arose under the Michigan Compensation Act, the cases cited deal entirely with the interpretation of policies of accident insurance in the ordinary sense of that term. In each of these cases a recovery upon the policy was denied for a bodily affliction that might be denominated as a disease, *but in each instance the recovery sought was expressly precluded by clear and specific stipulations and exceptions contained in the policy involved.* In each of the cases, except the two Michigan cases and the case in 157 Federal, the policy provided that the injuries or death must result from "external, violent and accidental means." In the Bacon, Dozier and Lickleider cases the policies contained further stipulations expressly excepting injuries resulting from disease or bodily infirmities. In the Shanberg case certain illnesses specifically mentioned in the policy were covered and all others excluded. In the case of the Standard etc. Ins. Co. v. McNulty the policy excluded injuries sustained while attempting to enter or leave any moving conveyance and the court held that *fatal* injuries incurred while attempting to enter a moving conveyance were included within the exception specified in the policy.

The quotation from the Shanberg case appearing on page 5 of Plaintiff in Error's brief is incomplete in that it omits the opening sentence of the paragraph from which the quotation is taken and the

sentence immediately following the quotation. These sentences indicate the real basis for the decision and are necessary to a proper understanding thereof, viz.:

> "The policy is one of indemnity against disability or death resulting directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means, and also against disability from certain illnesses therein specified."
>
> * * * * * *
>
> "The cause of death must in all cases where it is sought to recover under the provisions above quoted result directly and independently of all other causes from bodily injury sustained through external, violent and accidental means, or the event is without the scope of the contract."

Manifestly these cases can have no application to the case at bar except as they clearly indicate that the recovery would have been allowed but for the presence in the policy of the express stipulations which precluded the recovery. This distinction is clearly pointed out in the Columbia Paper Stock Co. case, 78 S. W. 320, and the case of Hood & Sons, 206 Mass. 223, hereafter referred to.

In the case of McCoy v. Michigan Screw Company, 147 N. W. 572, arising under the Michigan Compensation Act, the claim was based upon a

gonorrheal infection of the eye as to which the court held there was no evidence from which it could be legitimately considered that the injury arose in the course of the man's employment.

In the Adams case, 148 N. W. 485, also a case involving a construction of the Michigan Compensation Act, the court held that an occupational disease arising slowly and gradually from the exposure of the employe to a known poisonous agent was not a "personal injury due to accident" within the limited scope of the Act. The court considered the purpose of the Act, the limitations of its title and various other sections of the Act in reaching its conclusion. The case is clearly distinguishable from the case at bar. Occupational diseases such as these grow out of intentional and continued contact with and exposure to a distinct and known disease-producing cause. The probable result of such continued exposure or contact is known in advance to the workman and his employe; i. e., that injury or even death will ensue if the condition is continued sufficiently long. It is not unusual, unexpected or unforeseen, but on the contrary, is the natural and probable consequence of the conduct of employer and employe and an event that can properly be said to have been contemplated by the employe and his employer in such occupation. The case bears no analogy to the unusual, unforeseen and uncontemplated result or event on which the claims of injuries under consideration in the case at bar were founded.

As we have previously pointed out, the policy

under consideration is very much broader than a policy of accident insurance. It indemnifies against *claims* on account of "bodily injuries accidentally suffered, *or alleged to have been suffered.*" It is to be noted that the qualifying word "accidentally" is omitted with respect to injuries "alleged to have been suffered." A strict construction of the policy would require the Insurance Company to protect the Gas Company against claims of bodily injuries "alleged to have been suffered" without any qualification whatever. Assuming for the purposes of the argument, however, that the qualification "accidentally" be read into the phrase "alleged to have been suffered" an examination of the decisions of the appellate courts of the United States and England discloses an entirely different interpretation of the words "accident" and "accidental" from that set forth in Plaintiff in Error's brief. In the two cases from the United States Courts cited below the courts were dealing with the interpretation of the expression "accidental means," an expression which may very well have a much more limited significance than the expression "accidentally suffered" used in the policy under consideration.

Western Commercial Travelers Ass'n v. Smith, Circuit Court of Appeals, 8th Circuit, 85 Fed. 401.

In this case the insured met his death by blood poisoning resulting from an abrasion of the skin of one of his toes due to wearing a new shoe. The policy

by its terms was limited to "bodily injuries effected by external, violent and accidental means." The court in an opinion by Judge Sanborn, after reviewing the authorities, among them some of the cases cited by the Insurance Company in this case, held that the bodily injury sustained was not only produced by external and violent but also by accidental means. It disposes of the contention that the injury was not accidental in language which is directly applicable to the case at bar:

> "The contention is that it was not accidental * * *. An effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means.
>
> "Was the abrasion of the skin of the toe of the deceased the natural and probable consequence of wearing new shoes? It must be conceded that new shoes are not ordinarily worn

> with the design of causing abrasions of the skin of the feet, and the trial court has found that the abrasion upon the toe of the deceased was produced unexpectedly, and without any design on his part to cause it. * * * Nor can such an abrasion be said to be the natural consequence of wearing such shoes,—the consequence which ordinarily follows, or which might be reasonably anticipated. How, then, can it fail to be the chance result of accidental means,—means not designed or calculated to produce it?" (Pp. 405-406.)

The opinion cites with approval the definition of an "accident" in Insurance Company v. Burroughs, 69 Pa. St. 43, at page 51 as

> "An event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause or is an unusual effect of a known cause and therefore unexpected; chance; casual; contingency."

In United States Mutual Accident Association v. Barry, 131 U. S. 100, the deceased met his death due to a stricture of the duodenum which it was claimed had resulted from his jumping from a platform to the ground. Two of his companions had jumped from the same platform at the same time and place and alighted safely. The jumping itself was intentional. The case was tried before the Circuit Court and a jury and resulted in a verdict in favor of the

widow of the insured, and the judgment of the lower court was affirmed by the Supreme Court of the United States. It was urged on the appeal that there was no evidence to support the verdict because no accident was shown. On this phase of the question Mr. Justice Blatchford, who wrote the opinion, said as follows (page 121):

> "We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected'; that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the

injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

In the following case from the House of Lords the premises assumed in Plaintiff in Error's brief as the basis of its argument and the same objections as are now presented are considered and disposed of by the court in the opinions of the various judges quoted below.

Brintons, Limited v. Turvey, House of Lords and Privy Council, 1905 Appeal Cases 230.

This case arose under a proceeding brought under the Workmen's Compensation Act of 1897, to obtain compensation for the widow of an employe of the appellants who had become infected with anthrax while engaged in sorting wool in the appellants' factory, and who died from such disease. The Compensation Act at that time provided for the awarding of compensation for death or injuries "by accident."

The County Court Judge awarded compensation to the widow, saying as follows (page 230):

"I find as a fact that the anthrax, which was the immediate cause of death, was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased's person which afforded a harbour in which it

could multiply and grow and so cause a malignant disease and consequent death. I can see no distinction in principle between the accidental entry of a spark from an anvil or the accidental squirting of scalding water or some poisonous liquid into the eye. The only difference is that in those cases the foreign substance would be so large as to be visible, in this case the foreign substance is microscopic. I think it immaterial whether there was in fact any external pimple or abrasion because if there was, it was a fortuitous accident that the bacillus alighted on that particular spot. But I find in fact that there was no such abrasion or pimple. *My judgment is based on the fact that there was in this case a fortuitous intrusion of a foreign substance into the eye which by its presence there caused death.*"

This decision was affirmed by the Court of Appeal and was appealed from that court to the House of Lords and Privy Council. The report contains, at page 231, a summary of the argument of the appellants against allowing the compensation. Their *argument* is similar to that of Plaintiff in Error here, as appears from the extracts quoted below:

"There must be two things: A personal injury and an accident. The plain natural meaning of 'accident' must be taken. There must be some occurrence which would be popularly described as an accident, some force applied to the

> body: e. g., a pin prick, scratch, contact with sharp tool, bruise, wound, or the like. Sunstroke is not an accident within a policy against 'personal injury arising from accident' * * * because sunstroke arises from natural causes. So it is with anthrax, or any infectious or contagious disease. If there had been an abrasion by accident and the bacillus entered through the abrasion, the result would be different. If this case is within the meaning of the Act, then all cases of disease are."

After referring to certain other decisions and certain portions of the Act dealing with the question of notice, etc., the *argument* continues:

> "That seems to imply that an injury by anthrax is not an injury by accident. But if it is, then the other cases referred to in s. 73, lead, phosphorus, arsenical or mercurial poisoning, are also injuries by accident. An accident is one thing; an accidentally contracted disease is another."

The House of Lords sustained the ruling of the County Judge and the Court of Appeal in holding the widow entitled to compensation. We quote from the opinions of the judges as follows:

> "Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident. The smallest particle of dust swept by a

storm is where it is by the operation of physical causes, which if you knew beforehand you could predict with absolute certainty that it would alight where it did. But when the Act now under construction enacted that if in any employment to which the Act applied personal injury by accident arising out of and in the course of his employment is caused to a workman his employers shall pay compensation, I think it meant that, apart from negligence of any sort—either employers or employed—the industry itself should be taxed with an obligation to indemnify the sufferer for what was an accident causing damage. I do not stop to discuss the provisions which disentitle a sufferer, because they are not relevant to the question now under debate.

"I so far agree with my noble and learned friend that I think, in popular phraseology from which we are to seek our guidance, it excludes, and was intended to exclude, idiopathic disease; *but when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase accident causing injury, because the injury inflicted by accident sets up a condition of things which medical men describe as disease.*

"Suppose in this case a tack or some poisoned substance had cut the skin and set up

tetanus. Tetanus is a disease; but would anybody contend that there was not an accident causing damage?" * * *

"Many illustrations of what I am insisting on might be given. A workman in the course of his employment spills some corrosive acid on his hands; the injury caused thereby sets erysipelas—a definite disease; some trifling injury by a needle sets up tetanus. Are these not within the Act because immediate injury is not perceptible until it shews itself in some morbid change in the structure of the human body, and which when shewn we call a disease? I cannot think so."

By Earl of Halsbury L. C. pp. 233-4.

[Lord Halsbury's exclusion of idiopathic diseases would not exclude typhoid fever which is produced by an external foreign substance, viz., the bacillus typhosus. Idiopathy or "idiopathic disease" is defined as "a morbid state of spontaneous origin" by Borland's Medical Dictionary. It has also been defined as a disease "arising within the individual from no extrinsic or external cause."]

"My Lords, on the facts found by the learned county court judge I am of the opinion that the decision of the Court of Appeal was right. It is plain, I think, that the mischief which befell the workman in the present case was due to acci-

dent, or rather, I should say, to a chapter of accidents.

"It was an accident that the noxious thing that settled on the man's face happened to be present in the materials which he was engaged in sorting. It was an accident that this noxious thing escaped the down draught or suck of the fan which the Board of Trade, as we were told, requires to be in use while work is going on in such a factory as that where the man was employed. It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye. It must have been through some accident that the poison found entrance into the man's system, for the judge finds that there was no abrasion about the eye, while the medical evidence seems to be that without some abrasion infection is hardly possible. The result was anthrax, and the end came very speedily.

"Speaking for myself, I cannot doubt that the man's death was attributable to personal injury by accident arising out of, and in the course of, his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of death, and would no doubt be certified as such in the usual death certificate."

By Lord Macnaghten, pp. 234-5.

"In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental. The fact that an accident causes injury in the shape of disease does not render the cause not an accident."

By Lord Lindley, p. 238.

As the court well says in the case of Railway Mail Association v. Dent, 213 Fed. 981, at page 983:

"So many and varied are the causes of accidental injury that the particular language employed in instruments of insurance is of the greatest importance. A word added or omitted may alter materially the scope of the indemnity. Many cases like the one at bar lie close to the border line perhaps, because not definitely in mind for inclusion or exclusion, but it is a delicate thing for a court to adopt the latter course merely upon a supposition that they would have been excluded in terms had they been thought of. The insurer most familiar with the subject chooses the words of his undertaking, and it is not unjust to take them in the sense conveyed to the ordinary reader, nor to hold against him in case of real substantial doubt."

The cases cited as authority for its position by Plaintiff in Error and the cases heretofore referred

to are cases dealing with policies of accident insurance or cases in which the court was called upon to determine the meaning of the expressions "accident" or "accidental means" under policies or statutes in which these expressions were used. None of these cases deals with policies of indemnity insurance protecting employers against claims of "bodily injuries accidentally suffered or alleged to have been suffered" which are of a much more inclusive nature than the ordinary policy of accident insurance. The courts however have been called upon to construe policies of indemnity insurance similar to the policy under consideration and the rulings upon these policies, which are directly in point, fully sustain the ruling of the District Court in this action.

As the facts and the questions raised in the two following cases are so substantially identical with the case at bar the facts and opinions are set forth somewhat fully below. These cases dispose of every question raised and every argument made by Plaintiff in Error in its brief.

In Columbia Paper Stock Company v. Fidelity & Casualty Company, 78 S. W. 320, Missouri Court of Appeals, an action was brought by the Paper Company for reimbursement under a so-called "employers' liability" insurance policy for the expenses incurred in defending a suit of one of its employes. This employe had sued and recovered judgment against the Paper Company for a bodily injury sustained by contracting acute kidney disease or

dropsy engendered by absorbing poison from handling infected rags or paper in the course of her employment. Under the policy of insurance the Insurance Company agreed to indemnify the Paper Company "against loss from common law or statutory liability *on account of bodily injuries, fatal or non-fatal, accidentally suffered* within the period of this policy by any person or persons while within the premises hereinafter mentioned." The court of appeals affirmed a judgment in favor of the Paper Company against the Insurance Company upon the policy, holding that the injuries sustained by the employe from contracting kidney disease in the course of her employment were bodily injuries accidentally suffered within the meaning of the policy. We quote from the opinion as follows, page 323:

> "Appellant further puts forward the contention that a disease produced by a known cause cannot be accidental, and therefore such a disease as acute kidney disease or dropsy produced by the absorption of poison, consequent on handling infected paper or rags in the course of employment, is not covered by the policy; and the legal question is thus sharply presented whether the injuries consequent on such illness resulted from a cause against which the insurance was issued. In the construction of such contracts, it is well established that not only should they be given a fair and reasonable construction, so as to give effect to the objects

intended by the parties thereto, but any obscurity in the language employed in the contract is to be resolved against the insurer, and to receive a broad and liberal interpretation in favor of the assured. Again borrowing from the eminent authority on the law of insurance, above refered to: 'No rule in the interpretation of a policy is more fully established or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted. 1. May, Insurance (4th Ed), Secs. 174, 175. This doctrine has obtained recognition and application in the recent decision by the Supreme Court of Missouri already adverted to (Dezell v. Casualty Co., supra), wherein it was in substance, held that a policy insuring against bodily injuries sustained through external, violent and accidental means, but in terms not covering injuries, fatal or otherwise, resulting from poison, or anything accidentally taken, administered, absorbed, or inhaled, did not bar recovery for unintentional death resulting from medicine, though containing poison administered, bona fide to alleviate physical suffering." * * *

(P. 324): "An extensive array of decisions in England, as well as in America, submitted by respondent, tend to negative the proposition laboriously sought to be sustained by appellant —that a disease superinduced by a recognized cause is not to be considered accidental." * * * Citing a long list of American and English decisions in support of the principle stated.

"Appellant has invoked and appealed to several cases as upholding the doctrine contended for—that a disease produced by a known cause cannot be a bodily injury accidentally suffered, and therefore in conflict with the foregoing authorities." * * * The opinion then proceeds to distinguish these cases, among them some cited in Plaintiff in Error's brief, on the ground of the particular stipulations and exceptions in the policies, and proceds (page 325):

"In so far as these latter cases are opposed to the rulings hereinabove relied on, we must dissent from such conclusions, and adhere to what we deem the sounder reasoning and weight of authority. If, for example, in lieu of producing the more gradual and protracted infirmities of acute kidney disease or dropsical affection, the infected material submitted to defendant's workwoman had emitted poisonous gases or fumes, producing her instantaneous death, or resulting in immediate and violent convulsions, under numberless authorities the occurrence would, in legal contemplation, and

within the interpretation of policies insuring against accidents, be confidently pronounced accidental, yet such consequences would be disease produced by known causes.

"In conclusion, after full consideration, upon a fair and legal construction of the terms of this policy, which were for indemnity against loss from common-law or statutory liability for damages on account of bodily injuries, fatal, or non-fatal, accidentally suffered, the injury sustained by respondent's employe upon its premises in handling the infected rags and wall paper fell fairly within the true meaning and intent. The judgment below was rendered for the right party, and is affirmed."

H. B. Hood & Sons (Inc.) v. Maryland Casualty Company, 206 Mass. 223, 92 N. E. 329 (1910).

In this case the Maryland Casualty Company had issued to the plaintiff corporation, H. B. Hood & Sons, a policy insuring it

"against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered * * * by any employe * * * ."

While the policy was in force one Barry, an employe of the plaintiff, had the care of horses which were afterward found to have been suffering from glanders, and Barry was directed to assist in cleaning up the stalls. Barry was subse-

quently attacked by glanders and brought suit against the plaintiff for negligently exposing him to the disease. He obtained judgment for $1512, which Hood & Sons paid. An action was brought against Maryland Casualty Company to recover this sum and its disbursements in connection with the defense of the suit. The lower court found a judgment for the plaintiff for $2474.68, and this judgment was sustained on appeal.

The Supreme Court, in its opinion, pp. 224-226, says:

> "The policy is entitled, 'Manufacturers Employers Liability Policy.' The contract which it contains is one of indemnity in which the defendant engages to make good to the plaintiff any loss or damage which it may sustain by reason of its liability to its employes for bodily injuries accidentally suffered by them while engaged in doing the work which they were employed to do. It is a kind of insurance that has grown out of modern industrial and business conditions, and it is intended to afford full protection to employers in all cases where their employes have accidentally received bodily injuries for which they are liable. * * * It is to be noted that the policy does not contain the words 'violent and external' in addition to the word 'accidental,' as is the case in many if not most accident policies. The insurance is liability insurance so called, and not insurance

against accidents. The liability insured against is that 'imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered * * * by any employe.' Although the policy contains many conditions, there is no limitation or exception in regard to the kind or nature or cause of the accidents out of which the liability insured against may arise. The fact that the accident may have been occasioned through negligence on the part of the insured is, therefore, immaterial. * * *

"The question then is whether the amount which the plaintiff was compelled to pay Barry was paid 'for damages on account of bodily injuries accidentally suffered' by him within the meaning of the policy. It is plain that Barry suffered bodily injury in consequence of becoming infected with glanders; as much so as if he had had a leg or an arm broken by a kick from a vicious horse. Indeed, it is possible that the bodily injury caused by glanders was greater and more lasting than that caused by a broken leg or arm would have been. * * *

"Was the injury brought about accidentally within the fair scope and meaning of the policy, or was it the result of disease contracted while in the employ of the plaintiff but for which the defendant is not liable? It is clear, we think, that the infection which caused the disease from which Barry suffered was due to accident. It was in the nature of an accident

that he was set to work upon or cleaning up after horses that had glanders, and it was in the nature of an accident that he became infected with the disease. * * * If the disease was the result of an accident then we do not see why it does not follow that the bodily injury which Barry suffered as the result of the disease was not accidentally suffered, nor why the case does not come within the terms of the policy. The language is 'bodily injuries accidentally suffered.' It hardly could be broader. The intention is, as has been said, to afford full protection and indemnity to the assured. Any accident that causes bodily injury in any way is included. Bodily injury is more commonly associated perhaps with physical force of some sort, but in the absence of anything in the policy limiting it to that we do not see how or why it can or should be so restricted. A liability growing out of an accident which results in infecting the workman with a loathsome and dangerous disease and thereby causes him great and perhaps lasting physical injury would seem to be as much within the spirit and intent of the contract as if the injury had been caused by a blow or some other equally obvious manifestation of force. As was said by Lord Halsbury in Brintons v. Turvey, (195) A. C. 230, 233, the anthrax case, 'when some affection of our physical frame is in any way induced by an accident, we must be on our guard that

> we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by accident sets up a condition of things which medical men describe as disease.'
>
> "The construction which we are inclined to give to the policy accords with the great weight of authority in similar cases, and rests, we think, on sound principles."

The opinion cites a number of American and English cases, among them the case of Columbia Paper Stock Company v. Fidelity & Casualty Company, supra, and distinguishes the decision in the case of Bacon v. United States Mutual Accident Association, 123 N. Y. 304, cited in Plaintiff in Error's brief, upon the ground of the peculiar stipulations and exceptions contained in the form of certificate or policy sued upon in that case.

These two cases conclusively sustain the District Court's decision in the case at bar. They dispose of every objection and argument made by the Plaintiff in Error to defeat the indemnity contracted for by the Defendant in Error under the policy of insurance. None of these cases bases its reasoning or conclusion upon the proposition asserted by Plaintiff in Error that there must be an abrasion of the skin or a bruise or some other external indication of the injury. Both of these cases, as well as the case in the House of Lords clearly negative the contention that any such external injury or indication of

an injury is essential to recovery. The cases rest squarely upon the principle that injuries sustained in the body of the employe without the intent or fore-knowledge of employer or employe are bodily injuries accidentally suffered, whether or not the nature of the injury might also be denominated by medical men as a disease.

In a recent work, Fuller "Accident and Employers' Liability Insurance" (1913), page 445, the author discusses these indemnity policies as follows:

> "Nor is liability under these policies of employers' indemnity insurance confined to those cases alone where the assured is forced to pay damages to employes because of accident in the strictly literal sense of that term. They will also cover cases where an employe has contracted a disease under conditions such as to render the employer liable for negligence."

The rule applicable to the construction of insurance contracts is well stated by Mr. Justice Bean, now Judge of the District Court, in the case of Fenton v. Fidelity & Casualty Company, 36 Ore. 283, 48 L. R. A. 770, as follows:

> "If, however, the meaning of the policy is in doubt, and its language is fairly and reasonably susceptible of two constructions,—one favorable to the assured, and the other to the

> defendant,—the one is to be adopted which is the most favorable to the assured. This is the universal ruling in the construction of insurance policies, because they are drawn by the attorneys, officers, and agents of the company; and it is but fair that, if there should be any ambiguity or uncertainty in the language used, it should be construed most strongly against the company: American Sur. Co. v. Pauly, 170 U. S. 133; Utter v. Traveler's Ins. Co., 65 Mich. 545; Grand Rapids Elec. Light Co. v. Fidelity & Cas. Co., 111 Mich. 148."

The ruling in the Fenton case was cited with approval and followed by the U. S. Circuit Court for the District of Oregon in Tillamook Lumbering Co. et al., v. Liverpool & London & Globe Ins. Co., 175 Federal 508, in an opinion by Judge Wolverton, from which we quote as follows:

> "The construction more favorable to the insured is adopted, because of the usual custom of the insurance companies in propounding their own forms of policies and contracts; the insured being obliged to take what the company offers, notwithstanding the writing, as a rule, is accompanied with much prolixity and detail of stipulation, covenant, and warrant."

This judgment was affirmed by the Circuit Court of Appeals for this Circuit in Liverpool & London & Globe Ins. Co. v. Tillamook Lumbering Company et al., 178 Federal 161.

CONCLUSION

We submit therefore that on a common sense and fair interpretation of this policy and on the authorities herein referred to Defendant in Error is entitled to the indemnity it contracted for from the Plaintiff in Error against the expenses arising out of these claims against it by its employes. The very authorities relied upon by the Plaintiff in Error indicate most clearly the ability of insurance companies in writing these contracts to limit their application by stipulation, condition, proviso and exception to particular classes of bodily injuries or to particular causes of injuries when such limitation is within the minds of the contracting parties. It is a matter of common experience, as pointed out by Judge Wolverton in the Tillamook case, that insurance companies *do* make such stipulations with "much prolixity and detail" if the party assured is willing to purchase a policy of that nature. The assured in this case did not buy such a policy but on the contrary contracted for a policy that would fully protect it against the claims of its employes growing out of their employment. The policy is without exception or proviso limiting the broad scope of the indemnity agreement, and no such exception or pro-

viso may be read into this policy now that the event against which the policy was purchased has occurred.

Respectfully submitted,

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